

Supreme Court of New Jersey
Docket No.: 089508

**ASSOCIATION FOR
GOVERNMENTAL RESPONSIBILITY,
ETHICS AND TRANSPARENCY,
Plaintiff-Petitioner,**

v.

**BOROUGH OF MANTOLOKING,
MUNICIPAL CLERK OF THE
BOROUGH OF MANTOLOKING, AND
CUSTODIAN OF RECORDS,
Defendants-Respondents.**

Civil Action

**Appellate Division Docket No.:
A-002395-22**

**Sat Below, Appellate Division:
Hon. Lisa Rose, J.A.D.
Hon. Morris Smith, J.A.D.
Hon. Lisa Perez Friscia, J.A.D.**

**Law Division Docket No.:
OCN-L-2729-22**

**Sat Below, Law Division:
Honorable Francis R. Hodgson, A.J.S.C.**

**BRIEF OF PLAINTIFF-PETITIONER ASSOCIATION FOR GOVERNMENTAL
RESPONSIBILITY, ETHICS AND TRANSPARENCY IN SUPPORT OF
PETITION FOR CERTIFICATION TO ADDRESS THE COMMON LAW RIGHT
OF ACCESS TO PUBLIC RECORDS**

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STATEMENT OF THE MATTER INVOLVED

This appeal by Petitioner Association for Governmental Responsibility, Ethics, and Transparency (AGREAT) to the Supreme Court from final judgment of the Appellate Division is as of right pursuant to Rule 2:2-1 because of a dissent in the Appellate Division, but only as to those issues that were the subject of the dissent. The dissent concluded the email in question was a government record under the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13 but did not reach the common law right of access analysis. This petition seeks Certification of all issues decided by the Appellate Division, including the right to the record in question under the common law.

The public record sought by AGREAT through OPRA and the common law is an email that was used by the Mantoloking Borough Municipal Prosecutor on the record in a Superior Court proceeding and handed to defense counsel with the author's name redacted. The email advised the Mantoloking Borough Municipal Prosecutor to "remind" her adversary that if the adversary "reveals [information related to the expunged arrest and PTI] in open court he himself is guilty of a d/p offense as well as an ethics violation RPC 8.4(b)." (Majority Opinion, page 6, Pa8).¹

¹ The advice was flawed because the Appellate Division held that the expungement statute did not shield records regarding the complaining witness's arrest and guilty because N.J.S.A. 2C:52-19 allows "[i]nspection of the files and records . . . which are the subject of an order of expungement . . . for good cause shown and compelling need." State v. Burke, No. A-0503-22 (App. Div. July 19, 2023) (slip op. at 1-19).

At oral argument in the Law Division, the motion judge requested a certification from the Municipal Prosecutor regarding the email. In her certification, the Municipal Prosecutor acknowledged she handed a copy of the email to defense counsel in open court with the sender information redacted. The motion judge entered an Order dismissing the Complaint finding the email was not a government record under OPRA. The motion judge did not conduct a common law analysis.

On appeal, a majority of the Appellate Panel affirmed the decision of the motion judge by creating a new privilege to protect “information and advice between colleagues” in order to “shield[] attorney communications.” (Majority Opinion, page 29, Pa31) even though the majority recognized that the “email does not fall squarely within any exception to the government record definition under OPRA.” (Majority Opinion, page 23, Pa25).

Further, the majority held that disclosure of the contents of the email by the Mantoloking Municipal Prosecutor in open Court did not waive the privilege over the sender’s name and email address. (Majority Opinion, page 29, Pa31). The majority justified nondisclosure based on a “chilling effect on the collegiate relationship among attorneys and their private communications concerning their shared legal advice” if the record was released. (Majority Opinion, page 25, Pa27). The majority reached this conclusion even though the record does not establish that the sender of the email was an attorney and the so-called “private communication”

became public when the Municipal Prosecutor disclosed its contents in open court. Further, Mantoloking did not provide a Vaughn index or privilege log justifying a claim of privilege.

The dissent disagreed with the majority's analysis under OPRA, finding that emails to Municipal Prosecutors regarding prosecution of private citizens are government records subject to disclosure under the OPRA and, even if the communication was privileged, disclosure of the content of the email waived any privilege regarding the sender's identity and email address. The dissent did not "reach the common law right of access analysis." (Dissenting Opinion, page 1, Pa33).

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether an email to a Municipal Prosecutor about a matter the Municipal Prosecutor is handling which the Municipal Prosecutor read in Court and provided to defense counsel is a public record under the common law?
2. Whether the Borough of Mantoloking has an interest in secrecy greater than the public's interest in transparency under the common law sufficient to shield from disclosure an email to the Municipal Prosecutor directing the Municipal Prosecutor to "remind" a defense attorney "in open court" that he would be "guilty of a d/p offense as well as an ethics violation RPC 8.4(b)" if the defense attorney revealed

“information relating to an expunged report, arrest record, or PTI” and the Municipal Prosecutor did as directed.

3. Whether the Appellate Division engaged in a proper common law analysis by characterizing the request to a “discrete request for disclosure of the sending attorney’s name and email address” when the request only sought an email sent to the Municipal Prosecutor and the record below does not identify the sender as an attorney but only as a colleague and no Vaughn index or privilege log was produced.

THE ERRORS COMPLAINED OF

1. The majority erred when it determined that an email to a Municipal Prosecutor about the prosecution of a private citizen is not a public record under the common law.

2. The majority erred when it held that a public entity has an interest in secrecy over an email directing the Municipal Prosecutor to threaten a defense attorney in open court that outweighed the public’s interest in disclosure.

3. The majority misconstrued the record request by claiming that the request was for “the sending attorney’s name and email address” when 1) the request was for the email (unredacted), not simply a name and email address, 2) without a privilege log or Vaughn index, it is impossible to properly evaluate the purported privacy concerns of the Borough of Mantoloking, and 3) the sender’s profession as an attorney is not established in the record below.

THE REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This Court Should Grant Certification To Address The Common Law Analysis Because The Common Law Right Of Access Is A Question Of Public Importance And the Majority Failed To Adequately Weigh the Compelling Public Interests Identified By the Dissent

Recent legislative changes to OPRA demonstrate its vulnerability to legislative will and the importance of the common law right of access to governmental transparency. The common law right of access to public records is a bulwark against legislative efforts to limit access to public records. This case provides an opportunity to provide guidance to lower courts as to the factors to weigh in evaluating the common law right of access.

A requestor asserting a common law right of access must establish a wholesome public interest or a legitimate private interest. L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 574 (2019). Here, the majority opinion began its common law analysis by holding that AGREAT's public interest was not "wholesome" and that its private interest was not "legitimate." (Majority Opinion, page 26, Pa28). The dissent, on the other hand, recognized that "[t]he public has a substantial interest in knowing who directs and influences criminal court proceedings in our state by offering a prosecutor scripts and arguments to use in court." (Dissenting Opinion, page 9, Pa41).

This case presents an opportunity for the Court to provide guidance to lower courts on this threshold issue that has the potential of closing the courthouse doors

to legitimate attempts to insure governmental transparency and accountability. The danger is that without such guidance, Courts may find requests for public information to lack wholesomeness and legitimacy based upon the information requested and the personal predilection of the judge considering the matter, especially when the records requested might be embarrassing or unveil wrongdoing. The Court should take this opportunity to make clear that a requestor's burden on this gateway issue is not onerous and courts should take a hospitable approach so as not to suppress requests under the common law in the interest of governmental transparency.

Under the common law analysis, once a plaintiff proves an interest in the material, the burden shifts to the government to justify non-disclosure. “[O]nce the plaintiff’s interest in the public record has been established, the burden shifts to the public entity to establish that its need for non-disclosure outweighs the plaintiff’s need for disclosure.” O’Boyle v. Borough of Longport, 218 N.J. 168, 196 (2014).

The majority weighed AGREAT’s interest rather than the public interest and concluded, “we are not persuaded AGREAT’s right to access is outweighed by ‘the [Borough]’s interest in preventing disclosure.’”) (Majority Opinion, page 26, Pa28) (citation omitted). When a requestor advances the public’s interest in a common law public record, as here, the proper balance should be the public’s interest for transparency against the government’s interest in non-disclosure, not the personal

interest of the requestor. This case presents the opportunity for this court to make this principle clear. The majority's weighing of AGREAT's interest and the dissent's weighing of the public interest accounts for the difference in conclusions reached by the majority and dissenting opinions.

Not only did the majority weigh AGREAT's interest rather than the public interest, but it also required AGREAT to show its right to access was outweighed by "the [Borough]'s interest in preventing disclosure" (Majority Opinion, page 26, Pa28) rather than placing the burden of the government. Principles of openness and governmental transparency properly place the burden on the public entity to establish that its need for non-disclosure outweighs the plaintiff's need for disclosure. This case presents an opportunity for the Court to make this principle clear.

In this case, the majority did not evaluate the common law request pursuant to the factors enunciated by the Court in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986) (Loigman factors), finding them "not readily applicable." (Majority Opinion, page 26, Pa28). The dissent would have directed the release of the record under OPRA and did not reach the common law right of access analysis. (Dissenting Opinion, page 1, Pa33).

This case provides an opportunity for this Court to direct lower courts to articulate Loigman factors to consider when balancing the public interest in the records against the public agency's interest in confidentiality. In this case, the majority did not apply the Loigman factors and did not analyze how "disclosure will impede agency functions by discouraging citizens from providing information to the government" or that the persons providing information "did so in reliance that their identities would not be disclosed" or "the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure" or "the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers." Loigman, 102 N.J. at 113. The majority also did not analyze "whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency" or "whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials." Ibid. If the majority had applied the Loigman factors, the record would not support a finding that "disclosure will impede agency functions by discouraging citizens from providing information to the government" or that the persons providing information "did so in reliance that their identities would not be disclosed" or that the Borough of Mantoloking's self-evaluation, program improvement, or other decision making will be chilled by disclosure. The record would also not support a finding that

information sought was evaluative reports of policymakers, would provide no information regarding whether findings of public misconduct have been insufficiently corrected by remedial measures instituted by the Borough of Mantoloking, and would not support a finding that any disciplinary or investigatory proceedings of the Borough of Mantoloking circumscribe the public's need for the records sought. See *ibid.*

Indeed, as the dissenting opinion stated: “Because the sender’s information was redacted, and their identity remains unknown, we cannot know whether the advisory and consultative material in the email was inter[] or intra[] agency. **The majority makes this assumption, and the record does not support it. It is equally possible that the material is neither.**” (Dissenting Opinion, page 7, Pa39) (emphasis added).

This Court’s supervision and review is required to ensure the Appellate Division’s decisions are faithful to the facts as set forth in the record on appeal.

COMMENTS REGARDING THE APPELLATE DIVISION OPINION

In order to avoid disclosure of the email under the common law, the majority created a new privilege which it acknowledged had never before existed – a privilege on communications between attorneys. As an intermediate appellate court, the Appellate Division should have deferred to this Court on whether such a privilege, not based in any precedent, was warranted. Further, the majority disregarded this Court’s

pronouncement that “privileges stand in what we have declared to be a ‘disfavored status’ because they have an effect on the truth-seeking function.” State v. Mauti, 208 N.J. 519, 531 (2012) (quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 539 (1997)).

This Court should exercise its supervision in the interest of justice because the majority held that AGREAT’s interest (rather than the public’s interest) is not wholesome or legitimate is flawed, the majority created a new, broad privilege for communications between attorneys which is subject to abuse and the majority incorrectly placed the burden of establishing that the government interest in non-disclosure outweighs the public’s interest in transparency on the requestor rather than the government as this Court’s precedent requires.

As the dissent rightly noted, “the public has a right to know if, and when, the prosecution of one of our citizens has been improperly influenced.” (Dissenting Opinion, page 1, Pa33). The email at issue should have been released under the common law.

CONCLUSION

For the foregoing reasons, Petitioner Association for Governmental Responsibility, Ethics and Transparency respectfully requests that the Supreme Court grant this Petition for Certification for review of all issues decided by the Appellate Division, including the right to the record in question under the common law, and not just the issues that were the subject of the dissent.

Respectfully submitted,

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By: s/ Donald F. Burke
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Dated: November 3, 2024

CERTIFICATION

I hereby certify that this Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

By: s/ Donald F. Burke
Donald F. Burke, Esq.

Dated: November 3, 2024